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BRIEF OF PLAINTIFF

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1906.

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NO. 181

WILLIAM McKAY (SUBSTITUTED FOR MARY KALYTON) ET AL., PLAINTIFF IN ERROR,

vs.

AGNES KALYTON, BY LOUISE KALYTON, HER GUARDIAN *AD LITEM*.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

T. G. HAILEY,
R. J. SLATER,
Attorneys for Plaintiff in Error.

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STATEMENT OF CASE.

This is a suit commenced in the circuit court of the State of Oregon for Umatilla County by the plaintiff, a minor, through her mother, Louise, an Indian woman, as guardian *ad litem*, to determine plaintiff's right to certain lands allotted to one Joe Kalyton, deceased, upon the Umatilla Indian Reservation in Oregon, under the act of Congress of March 3, 1885, providing for allotments on such reservation. The plaintiff claims to be the daughter of said Joe Kalyton, while defendant, (who has since died and is now represented by her heir) was a sister. In April, 1891, Joe Kalyton and

the plaintiff's mother Louise, both being Indians born within the territorial limits of the United States, received separate allotments upon the Umatilla Indian Reservation under the act above mentioned. Kalyton then had a wife with whom he was living and from whom he was afterwards divorced, and Louise had lived as wife with two or three different Indians and had never been divorced from any of them. In 1893, about two years after the allotment had been made, Kalyton and Louise began to live together, and Louise claims that this was a marriage according to the customs of their tribe. They thereafter cohabited for about five years, when Kalyton died, about the first of January, 1899, and the plaintiff was born the following fall, as Louise says, "before Christmas, about when leaves begin to fall." Defendant, however, claims that they were never married by custom or otherwise, and that their cohabitation was meretricious throughout. A demurrer questioning the jurisdiction of the state court over the subject matter of the suit was overruled, and after a trial upon the issues a decree was rendered in favor of defendant, which held that Kalyton and Louise being allottees were citizens, and there could be no marriage under the Indian custom between them. From which decree the plaintiff appealed to the supreme court of the State of Oregon, where the decree of the lower court was reversed and a decree entered in favor of the plaintiff declaring her to be the daughter and sole heir of Kalyton, deceased, and as such, entitled to the allotment made to him; and holding also that such marriage was valid for the reason that both Kalyton and Louise were not citizens in the full sense and tribal customs still prevailed among their people. A careful reading of the opinion of the supreme court will disclose that it was based upon the erroneous idea that Indians to whom allotments have been made are still wards of the government, and that allotted lands upon an Indian reservation held by the United States as trustee, have the same legal status as public lands of the United States. Under the pleadings in this case three facts are admitted which we regard under the decisions of this court as fatal to the plaintiff's contention. First, the subject matter of this suit is the right to an allotment of lands upon an Indian reservation, the title to which lands is held by the government of the United States as trustee. See-

ond, the alleged parents of the plaintiff were allottees under the act of March 3, 1885, providing for the allotment of lands upon the Umatilla Indian Reservation, at the time they were married in 1893. Third, the marriage, if any, between said parties, was according to the custom of the Indian tribe to which they belong, and not in accordance with the laws of the State of Oregon.

The first question presented by this appeal, then, is whether or not the state court had jurisdiction of the subject matter of this case. In other words, whether the state courts have jurisdiction to hear and determine controversies over the right to allotments upon an Indian reservation the title to which lands is held in trust by the government of the United States. And, second, whether or not, under the terms of the general allotment act of February 8, 1887, commonly known as the Daws act, Kalyton and Louise, the alleged parents of plaintiff, were citizens of the State of Oregon and as such subject to all its civil laws, including that of marriage. The contention on the part of plaintiff in error herein is that the state courts have no jurisdiction over allotted lands as long as the title thereto is held in trust by the government for the benefit of the allottee, and that all Indians born within the territorial limits of the United States, to whom allotments have been made under any law or treaty, thereby become citizens of the United States and of the state or territory in which they reside, and subject to all the laws both civil and criminal of such state or territory, and that tribal customs are thereby abolished and marriages and divorces must thereafter be in accordance with the state law. In support of this contention are cited the following:

POINTS AND AUTHORITIES.

I.

The legal title to the lands involved in this suit is in the United States as trustees for twenty-five years for the allottee, or in case of death, his heirs.

Act March 3, 1885, 53 Stat. 340.

II.

The only authority for such suit as this is the act of Congress of August 15, 1894, 28 Stat. 305, which confers jurisdiction therefor upon the United States circuit courts, and such jurisdiction is exclusive.

Act Aug. 15, 1894, 28 Stat. 305.
Patawa v. U. S., 132 Fed. 894.
Parr v. U. S., 132 Fed. 1004.
Smith v. U. S., 142 Fed. 226.
Wisconsin Ry. Co. v. Price County, 133 U. S. 496-504.

III.

Prior to the passage of the act of August 15, 1894, *supra*, the authority to determine the rights of claimants to allotments upon the Umatilla Indian Reservation was vested in the Secretary of the Interior.

Act March 2, 1885, 23 Stat. 340.
Mosgrove v. Harper, 33 Or. 252.

IV.

Indians born within the territorial limits of the United States to whom allotments have been made, are citizens of the United States, and of the state or territory where they may reside, and subject to and entitled to the benefits of all the laws, civil and criminal, of such state or territory.

Act. Feb. 8, 1887, Sec. 6, 24 Stat. 388.
Boyd v. Thayer, 143 U. S. 135-162.
In re Haff, 197 U. S. 488-509.
State ex rel v. Denoyer, 6 N. Dak. 286.
State ex rel v. Norris, 37 Neb. 299.
In re Now-Ge-Zhuck, 69 Kans. 410.

V.

Such Indian allottees are subject to the laws of the state in which they may reside governing their marriage relations.

Moore v. Wa-Mc-Go, 83 Pac. 400.

ARGUMENT.

The questions presented to this court by this case, are very important, and demand the greatest care and consideration, since, the principles to be settled are new, and will affect, largely, almost every Indian in the United States, who has had lands allotted to him in severalty.

All the questions involved are federal questions, and can not be fairly and authoritatively settled in the state courts. A careful reading of the decision of the Supreme Court of the State of Oregon in this case, and the decisions of the United States Court for the District of Oregon, shows a wide and almost irreconsilable conflict in the construction and applications of the laws of the United States to the Indians. That, doubtless, was the prime motive in congress confering exclusive jurisdiction upon the U. S. Courts, in such cases.

We are willing to concede to the Indian, personally, all the rights, privileges and immunities of citizens of the United States, and the state of Oregon (Act. of Con. Feb. 8, 1887, Sec. 6, 24 Stat. 288.) Personally he is emancipated, (In re Huff 197, U. S. 488, 509,) when he has accepted an allotment and is no longer a ward of the United States; but in conferring so much liberty upon the Indian, Congress was carefu to retain for his protection, the title to his lands, and did not either expressly, or impliedly surrender the jurisdiction of the same to the state courts, or to state jurisdiction, (U. S. vs. Rickarts, supra.) This jurisdiction was expressly conferred upon the United States courts by act of Congress August 15, 1894, 28 Stat. 305, and it must rest there until it is changed by Congress or until the title finally passes from the United States.

The Supreme Court of the State of Oregon in its opinion in this case based the right of jurisdiction over the subject matter in the state court upon the question of right of possession and occupancy only, and cites in support thereof several cases of that court which hold in effect that a claimant of public lands having complied with the requirements of law entitling him to possession for the purpose of perfecting his claim and acquiring title thereto from the government, can maintain proper proceedings in the state court to protect his right of possession for the purposes mentioned, although the legal title may still be in the United States. This is undoubtedly just and sound law; but it has no application to the case at bar.

It has been held by this court that where there is a conflict of claimants to the title to land, the legal title to which is still held by the United States, neither state nor federal courts will entertain jurisdicion to determine such conflict. Moore v. Robbins, 96 U. S. 530; U. S. v. Schurz, 102 U. S, 378. Such is the question in this case and even the federal court would not now have jurisdiction herein were it not specially conferred by the act of Congress of August 15, 1894. Sloan v. U. S., 95 Fed. 193. Each of the litigants herein claims the right to the possession and beneficial use of the land involved as owner of the equitable title thereto, the legal title being in th government to be conveyed to the true equitable owner when the trust period has expired. The question in issue here is which claimant shall receive such legal title when the trust has ended, and the right to present possession and occupancy is dependent upon that issue. It is not a question of one lawfully entitled to possession being unlawfully disturbed by one with no right to possession; but a case, which of two claimants to title has the better right, and the question involved is entirely within the scope of the act of August 15, 1894, conferring jurisdiction upon the United States circuit court where a person of Indian blood or descent claims a right to an allotment from which he has been excluded or denied.

The cases cited in the opinion of the Oregon Supreme Court of Bird v. Winyer, 24 Wash. 269 and Bird v. Terry, 129 Fed. 472, have no application to the case at bar for the reason that in both of

these cases the legal title to the lands involved had passed from the government to the allottee. In the case at bar the legal title is still in the government and the question is who shall receive such title when the trust period has expired? The word "heirs" is mere description of the donees, who take directly from the government in the event of the allottee's death during the trust period, as they did under the old Oregon Donation Land Act of 1850. Davenport v. Lamb, 80 U. S. 418; Hall v. Russell, 101 U. S. 502. The allottee in this case having died, the question is which if the litigants is entitled to the lands involved as donee of the government. It is purely a question of title. Not a question of right to possession to perfect title; but a question of right to present possession based upon present right to the legal title to be acquired without any act of occupancy or otherwise to be performed to perfect such title. Such being the case, it is a dispute as to title to lands held by the United States and the state court has no jurisdiction thereof. Moore v. Robbins, *supra;* U. S. v. Schurz, *supra.*

Further, the assumption of jurisdiction of the state courts to determine who is entitled to such land when the legal title is still in the United States would be an interference with the primary disposal of the soil of this state, which is contrary to the terms of the enabling act admitting the State of Oregon into the Union, and an interference with the regulations of Congress for securing the title to said soil to bona fide purchasers thereof. Act of Congress February 14, 1859, and of the legislative assembly of the State of Oregon June 3, 1859; which latter act reads as follows:

"Be it ordained by the legislative assembly of the State of Oregon that the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title to said soil to the bona fide purchasers thereof; and that in no case shall non-resident proprietors pay taxes higher than residents; and that said state hsall never tax the land or property of the United States within the said state."

Prior to the allotment of lands in severalty upon the Umatilla

Indian Reservation such reservation was Indian country and the title to the lands therein were within the exclusive jurisdiction of the United States, and by the allotment act under which the lands in controversy were allotted a portion of said reservation was allotted in severalty to the Indians in common for grazing and pasturage purposes, reserving title, however, in the United States as trustee, and we fail to see where, so far as the title to the lands is concerned, the status of the reservation is changed from what it was prior to the allotment. Then the government held the legal title for the benefit of the Indians in common; since the allotment it has held the legal title to the allotments for the benefit of the Indian allottees, and of the grazing lands for the benefit of the Indians in common, with the proviso that at the end of twenty-five years title to the individual allotments shall vest in the allottees, or in case of their death, in their heirs by conveyance from the United States. Based upon this right of legal title to the land allotted, the United States in the case of U. S. v. Rickert, *supra*, has successfully asserted its right to prevent the assessment of permanent improvements upon allotted lands, and in the numerous cases growing out of the leasing of lands, upon the Winnebago Reservation in Nebraska without the consent of the Secretary of the Interior, has maintained its right to invoke the aid of the court to restrain persons from securing leases from the Indians on said reservation other than such as are authorized by law. U. S. v. Flournoy Live Stock Co., 69 Fed. 886, and 71 Fed. 576. And in the case of U. S. v. Gardner, 133 Fed. 285, it was held that the title to allotted lands upon the Colville Reservation in the State of Washington remained in the United States and it could recover from a person the value of timber unlawfully cut and removed from such allotted lands. These cases, we think, clearly establish the authority of the United States over allotted lands. Such lands, however, in the opinion rendered in this case by the supreme court of the State of Oregon, are placed upon the same footing as vacant public lands or public lands upon which settlers have initiated bona fide claims; but such lands are not public lands subject to occupancy or settlement under the public land laws of the United States. They are on the contrary reservations set apart for special purposes ,for the benefit

of Indians residing thereon, and are controlled by the different department from the public lands of the United States, and no title to such lands is acquired through the general land department of the government, but through the special department of the office of the Secretary of the Interior with the commissioner of Indian affairs in charge thereof, and prior to the act of August 15, 1894, conferring jurisdiction to settle controversies over the rights to allotments upon the various United States circuit courts, all such controversies were determined through the Indian department of the government with the Secretary of Interior as head thereof, and there was no court provided with jurisdiction to settle such controversies. On August 15, 1894, however, Congress conferred jurisdiction upon the United States circuit courts to determine such matters. In passing upon the question of the jurisdiction thus conferred, the late United States District Judge Bellinger, in Parr v. U. S. 132 Fed. 1004, said: "There can be no proceeding of the character in question other than that provided for by the acts of Congress referred to. The jurisdiction conferred by these acts is exclusive in the circuit court of the United States." To the same effect is Patawa v. U. S. 132 Fed. 693-4; Smith v. Bouifer et al. 132 Fed 889, and Smith v. U. S. 142 Fed. 226, which latter case was decided by United States District Judge Wolverton, late chief justice of the supreme court of the State of Oregon. The statement of this court in Wisconsin Ry. Co. v. Price Co., *supra,* that "the constitution vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And this implies an exclusion of all other authority over the property which could interfere with the right or obstruct its exercise," would clearly indicate that where the United States has power to dispose of and make all needful rules and regulations, as it undoubtedly has over Indian lands whether allotted or unallotted, and has confered jurisdiction upon certain courts for settlement of all controversies regarding such lands, such jurisdiction must be exclusive. The title to the land is held in trust by the United States for the benefit of the allottee or his heirs in case of his death prior to the expiration of the trust period, to be conveyed free of all encumbrances, and the

government has the duty imposed of supervising the rental of such land and necessarily the occupancy thereof, and until the issuance of final patent has the exclusive control thereof. To suffer the various state courts to pass upon the right to occupancy of these lands would necessarily interfere seriously with the duties of the government and with its rights as trustee, and obstruct the exercise of such rights. If the state courts have jurisdiction over the right of occupancy of such lands they must necessarily have jurisdiction to enforce any judgments or decrees entered in regard thereto, and such decrees and enforcement thereof might seriously interfere with the rights and duties of the government as trustee in regard to such lands. Under the decisions heretofore cited, it is clear that one of the duties of the government as trustee is to protect the allottees of such lands in their possession and right of occupancy thereto, and the difficulty that might arise if jurisdiction over such lands should exist in the state courts, is well illustrated in the case of U. S. v. Rickert, *supra*. In that case if the state had jurisdiction to levy a tax upon the improvements upon allotted lands it would necessarily follow that the state courts would have jurisdiction to determine all rights to such improvements, and such a holding would interfere with the duties of the government as trustee. In the case of Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401 415, this court in an opinion rendered by Associate Justice Peckham, held in a suit brought in the United States circuit court for the district of Oregon under the act of August 15, 1894, prior to the amendment thereto of February 6, 1901, that the United States was not a necessary party to such suit, basing his decision, however, upon the terms of the statute itself, which provides that the judgment or decree of the court upon being properly certified to the Secretary of the Interior is to have the same effect as if the allotment had been allotted and proved by the secretary, and saying: "This provision assumes that an action may be maintained without the government being made a party, and provides for the filing of a certificate of the judgment and its effect and the government thereby in substance and effect consents to be bound by the judgment and to issue a patent in accordance therewith." But this construction so far as the necessity of the United States as a party

defendant, only applies to suits of this character begun in the United States circuit court under the provisions of the act, and could not and does not apply to a suit of this character begun in the state court. The decision in effect says that if the statute itself did not provide for the effect of such a decree and the action of the Secretary of the Interior therein, that it would have been necessary even prior to the amendment in a suit of this character in the United States court to have made the United States a party defendant. The United States, therefore, being a necessary party in all cases of this character, except where otherwise provided by statute, as held in the foregoing cases, it was a necessary party in this suit if the state court was to acquire jurisdiction of the subject matter of the suit.

As to the question of the citizenship of the allottees, we deem it unnecessary to do more than refer to the recent decision of this court in re Heff, 197 U. S. 488, and the other authorities heretofore cited on that point. Both of the parties herein, Joe Kalyton, deceased, and Louise, the mother of the plaintiff, being citizens of this state and subject to its laws at the time of their alleged marriage, must have been married according to the laws of this state, but the contention on the part of the plaintiff is not that they were married according to the laws of this state, but according to the Indain custom, and that custom having been abolished, there was no marriage between the parties.

Most respectfully submitted,

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